Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
RURAL CELLULAR ASSOCIATION	)	**RM-11497**
	)	
Petition for Rulemaking Regarding	)	
Exclusivity Arrangements Between	)	
Commercial Wireless Carriers and	)	
Handset Manufacturers	)	

REPLY COMMENTS

Thumb Cellular, LLC, (Thumb), by its attorney, hereby files its reply to various comments made in the captioned proceeding. In reply thereto, and in support of the petition for rule making, the following reply comments are respectfully submitted:

Background

Thumb is a Tier III rural cellular carrier serving fewer than 500,000 subscribers in the lower peninsula in Michigan.[1] Thumb's rural market, MI RSA 10, is adjacent to several much larger urban markets which are served by much larger nationwide Tier I wireless carriers and regional Tier II carriers.[2] Moreover, Thumb's rural cellular market, MI RSA 10, has been overbuilt by much larger nationwide Tier I and regional Tier II PCS carriers.

---

[1] *See Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems, Phase II Compliance Deadlines for Non-Nationwide CMRS Carriers, Order to Stay*, 17 FCC Rcd 14841, 14847 ¶¶22-24 (2002).

[2] Tier II carriers have more than 500,000 subscribers, but are not one of the six nationwide carriers. *See Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems, Phase II Compliance Deadlines for Non-Nationwide CMRS Carriers, Order to Stay*, 17 FCC Rcd 14841, 14847 ¶¶22-24 (2002).

The Commission Has Jurisdiction Over The Manufacture & Distribution of Handsets

Verizon argues that the Commission lacks jurisdiction to regulate equipment vendors' contractual relationships with wireless service providers. Verizon's *Comments* at 4. The Commission need not devote too much time to Verizon's jurisdictional argument. The Commission plainly has jurisdiction over wireless carriers even if the Commission did not have jurisdiction over handset vendors/manufacturers.[3] The Commission's rules at Parts 20, 22, 27, 90, for example, contain hundreds of regulations imposed upon wireless carriers. The question, then, is whether the Commission may regulate the contractual relationships of those it regulates for the purpose of regulating interstate telecommunications.

The Commission's authority to regulate contractual relationships of Commission regulated entities cannot seriously be disputed. For instance, the Communications Act authorizes the Commission to regulate the contractual relationships between broadcast stations and broadcast networks. *See e.g.*, 47 C.F.R. § 73.658 (Affiliation agreements and network program practices; territorial exclusivity in non-network program arrangements). These contractual restrictions placed upon Commission regulated entities have been upheld even though they implicate First Amendment concerns. *See e.g.*, *N.B.C. v. United States*, 319 U.S. 190, 63 S. Ct. 997, 87 L. Ed. 1344 (1943) (upholding network affiliate option time). Regulation of supplier/purchaser contracts is not something new at the Commission, it is a Commission power of long standing and, unlike the Commission's regulation of broadcaster/network contracts, the relationship between Verizon and the other large carriers and their tied up equipment manufacturers do not implicate any First Amendment

---

[3] Of course, the Commission has direct jurisdiction over equipment manufacturers as discussed more fully below.

concerns.[4]

Moreover, the Commission has authority pursuant to Section 1 of the Communications Act to adopt "ancillary" rules and for more than 30 years the "courts . . . have uniformly and consistently interpreted the Act to give the Commission broad and comprehensive rule-making authority in the new and dynamic field of electronic communication." *GTE Serv. Corp. v. FCC*, 474 F2d 724, 730–31 (2d Cir 1973) (upholding Commission's ancillary authority pursuant to Section 1 authority); *see also Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation for Secretly Degrading Peer-to-Peer Applications*, 23 FCC Rcd. 13028 n. 76 (FCC 2008). Verizon's notion that there is an area of the equipment manufacture and supplier/purchaser relationship upon which the Commission may not intrude does not present even the veneer of a substantial legal prohibition which precludes ameliorative action by the Commission, that is, Verizon's jurisdictional argument is less than thin.

Footnote 2 at page 4 of Verizon's *Comments* argues that there has been insufficient notice to adopt a large carrier/equipment manufacturer exclusive contract prohibition rule because "the Petition itself identifies no specific language for a rule . . .." The APA does not require that specific rule language appear in the rule making document. The Commission has very broad rule making authority and the rule making notice "need not specify every precise proposal which [the agency] may ultimately adopt as a rule;" the Commission's rule making notice need only "be sufficient to fairly apprise interested parties of the issues involved." *See Nuvio Corp. v. FCC*, 473 F3d 302, 310 (DC Cir 2006) (internal quotations omitted). The issue involved instantly is whether the Commission

---

[4] Verizon's argument that the Commission cannot regulate equipment makers/vendors directly, Verizon *Comments* at 4, cannot be taken seriously. For instance, the Commission requires manufacturers to 1) have their equipment approved for use under Part 15 and 2) the rules impose manufacturing requirements upon handset manufacturers. *See e.g.*, 47 C.F.R. § 20.19(c)(1) (FCC requires handset manufacturers to manufacture HAC compliant handsets).

should prohibit exclusive arrangements between large carriers and handset manufacturers and the issue is squarely presented in the instant proceeding.

Moreover, the Commission's rule making authority is so broad that it may adopt rules which ***differ*** from than those proposed if they are a "logical outgrowth" of the discussion contained in the rule making proceeding. *See Weyerhaeuser Company v. Costle*, 590 F.2d 1011,1031 (D.C. Cir. 1978); *Owensboro on the Air v. United States*, 262 F.2d 702 (D.C. Cir. 1958); *see also Commission Policy Concerning the Noncommercial Nature of Educational Broadcast Stations*, 90 FCC 2d 895 n. 38 (FCC 1982) ("the fact that the rules promulgated differ from those proposed does not require an additional notice, nor does it entitle parties to submit additional comments. *Spartan Radiocasting Co. v. FCC, supra* at 321; *Consolidated Coal v. Costle, supra* at 248; *Ethyl Corp. v. EPA*, 541 F.2d 1, 48 (D.C. Cir.) *cert. denied*, 426 U.S. 941 (1976)"). The Commission's rule making authority is extremely broad and it is not cabined in the manner that Verizon argues.

Verizon own *Comments* discuss that the actual legal requirement for notice in a rule making proceeding is that the "substance" of the proposed rule be discussed in the notice of proposed rule making. Verizon *Comments*, at 4 n. 2. Verizon devotes thirty-five (35) pages, not counting a twelve (12) page supporting attachment, to explain why the proposed rule does not suit Verizon's view of the public interest. Clearly, Verizon has been given adequate notice about the substance of the proposed rule and Verizon has taken the opportunity to discuss its thoughts on the subject at length. Verizon's argument that the Commission has not provided adequate rule making notice is belied by Verizon's own extensive discussion of the subject matter.

Large Carrier Exclusive Arrangements Are Not in the Public Interest

Thumb fully supports the effort to prohibit exclusive arrangements between the large carriers and handset manufacturers. These exclusive arrangements provide the larger carriers with a

competitive advantage based solely upon their size which allows them to tie up equipment manufacturers with long term exclusive production/distribution agreements. The effect of these exclusive arrangements is to preclude small carriers, such as Thumb, from obtaining cutting edge technology and service opportunities until such time as the technology is no longer cutting edge and long after rural consumers have been denied service choices.[5] It appears that the large carriers feel that the public interest is served by restricting the access of small carrier subscribers to cutting edge technology and by limiting consumer service choice in smaller markets.[6] While Verizon might be correct that "no single manufacturer or service provider has sufficient market power in their respective markets to control the distribution market," Verizon *Comments*, at 12, Verizon misses the point. The issue is not whether a particular market or group of markets is affected by or can affect handset distribution, nor whether a particular market or carrier can influence a particular manufacturer, but rather, whether the nationwide distribution of handsets, and the public interest, is adversely affected by the combined exclusive dealing arrangements which exist between the large Tier I and Tier II carriers and the handset manufacturers.

The public interest is not served by large carrier/vendor/manufacturer exclusive supply contracts which limits both technology and service access to rural markets. For instance, regarding the availability of HAC compliant handsets, the Commission granted numerous waivers of the HAC rule because smaller carriers could not obtain HAC complaint handsets because the HAC compliant

---

[5] The Commission has determined that "roughly 61 million people, or 21 percent of the US population, live in rural counties. These counties comprise 3.1 million square miles, or 86 percent of the geographic area of the U.S." *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services*, 23 FCC Rcd 2241 ¶ 104 (FCC 2008).

[6] Small carriers lack the market power to enter into production agreements with handset manufacturers and they must obtain their handsets from intermediary vendors.

handsets were not available to them because larger carriers had them tied up and the manufacturers satisfied the larger carriers' HAC handset needs ***first***. If the handsets had been manufactured without regard to the identity of carriers, then distribution of the HAC handsets most likely would have proceeded differently and fewer waivers would have been required and fewer smaller companies would have been found in violation for failing to obtain the HAC compliant handsets. It is difficult to conceive of a rational under which the public interest is furthered by denying access to technology and service choice to small carriers and their subscribers.

Thumb provides here a list of handsets models which its vendor has advised it are exclusive to a large carrier:

Verizon
Motorola KRAVE ZN4--lifetime exclusive
LG Chocolate 3--long term exclusive
LG Dare--long term exclusive
LG Envy--long term exclusive
LG Voyager--long term to lifetime exclusive
LG Decoy--long term exclusive
LG VX 9400–long term exclusive
Samsung Alias--long term exclusive
UT Starcom GzOne–lifetime exclusive
Blackberry STORM--a lifetime exclusive

AT&T
iPhone–a ten year exclusive
LG Shine mto–long term exclusive
Samsung Black Jack II--long term exclusive
Blackberry BOLD--long term exclusive

Sprint
Samsung Instinct--short term exclusive (Thumb will have a version of this in April of 2009)
Samsung Ace--long term exclusive
Samsung Upstage--long term exclusive
Sanyo Katana--long term exclusive (Thumb believes that the Sanyo brand is exclusively sold to Sprint)

Tmobile
HTC G1 (Google)--exclusive

Sidekick--long term exclusive

The handsets listed above are in demand by subscribers of large carriers precisely because they offer cutting edge technology and service opportunities. There is no public interest justification which supports denying these benefits to rural America. Thumb is unable to obtain these handsets because of the large carriers' ability to tie up the distribution of them at the manufacturer level. Thumb, and carriers like it, are too small to have supply/manufacture agreements with equipment makers. While Thumb must compete against the large carriers in MI RSA 10, the large carriers have a huge competitive advantage vis-a-vis their ability to distribute cutting edge handsets, an advantage which emanates solely from their size and the large carriers use their size to restrict equipment access to rural America through their exclusive manufacture/distribution arrangements with handset manufacturers as discussed in the petition for rule making. It is difficult to conceive of a situation which presents a clearer restraint of trade issue -- consumers are denied technology and services and rural carriers are denied a fair opportunity to compete against large carriers.

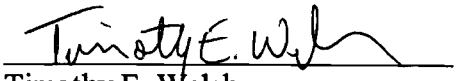
Moreover, the Commission has repeatedly stated that the public's interest is furthered by the promotion and distribution of advanced technology and services to rural areas. However, the large carriers disagree and prefer exclusive dealing arrangements which provides them with a market/marketing advantage, but which deprives large portions of the public access to advanced technology and which denies small carriers a fair opportunity to compete. Clearly, the public interest is benefitted when all Americans have access to advanced technology. The benefits of advanced technology and services can no longer be limited to the several large carriers and the time has come for the Commission to step in and correct a market distortion which is caused by the sheer size of the large carriers and their ability to tie up equipment offerings of the handset manufacturers.

WHEREFORE, in view of the information presented herein, it is respectfully submitted that the Commission adopt a rule which prohibits exclusive supply contracts and other arrangements between large carriers and equipment manufacturers and equipment vendors.

Hill & Welch
1330 New Hampshire Ave., N.W. #113
Washington, D.C. 20036
202-775-0070
202-775-9026 (FAX)
welchlaw@earthlink.net

February 18, 2009

Respectfully Submitted,
THUMB CELLULAR, LLC



Timothy E. Welch
Its Attorney